[fol. 19] IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 17879 Criminal

UNITED STATES OF AMERICA

vs.

JOHN SOKOL

X

ORDER DISMISSING INDICTMENT—Filed March 18, 1955

Before GANEY, J.:

And Now, to wit: March 18th, 1955, in accordance with the Opinion of the Court allowing defendant's motion to dismiss, it is Ordered that the Indictment in the above action be and the same is hereby Dismissed for lack of jurisdiction.

(S.) J. Cullen Ganey, J.

[fols. 20-25] IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 17804 Criminal

UNITED STATES OF AMERICA

vs.

PAUL DEEMER JOHNSTON

XI

ORDER DISMISSING INDICTMENT—Filed March 18, 1955

Before GANEY, J.:

And Now, to wit: March 18th, 1955, in accordance with the Opinion of the Court allowing defendant's motion to dismiss, it is Ordered that the Indictment in the above action be and the same is hereby Dismissed for lack of jurisdiction.

(S.) J. Cullen Ganey, J.

[fol. 26] [File endorsement omitted]

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,620

UNITED STATES OF AMERICA, Appellant,

v.

PAUL DEEMER JOHNSTON

No. 11,621

UNITED STATES OF AMERICA, Appellant,

v.

JOHN SOKOL

Appeals from the United States District Court for the Eastern District of Pennsylvania

Argued November 2, 1955

Before Goodrich, Staley and Hastie, Circuit Judges

OPINION OF THE COURT—Filed December 1, 1955

By GOODRICH, Circuit Judge:

These two cases raise the question of the proper venue in a prosecution for disobedience of the provisions of the Universal Military Training and Service Act.[1] The facts [fol. 27] are simple and undisputed. The two defendants registered in accordance with the draft law and were classified I-O. Each was directed by his local board to appear before the board to be assigned to "Civilian work contributing to the maintenance of the national health, safety, or interest . . ."[2] Each appeared before his local board in accordance with the instructions received in SSS

[1] 62 Stat. 604 (1948), *as amended*, 50 U. S. C. App. § 451-473 (1952).

[2] 65 Stat. 86 (1951), 50 U. S. C. App., § 456(j) (1952).

Form No. 153. Sokol was assigned to hospital work at Philadelphia State Hospital, Philadelphia, Pennsylvania, and Johnston to the Norristown State Hospital, Norristown, Pennsylvania. Both hospitals are located in the eastern district of Pennsylvania. Each told his local board that he would not obey the order of assignment and each never entered the eastern district to do the work assigned. Both at all times resided in the western district of Pennsylvania and their local boards were located in this district. Both registrants were indicted in the eastern district of Pennsylvania. The district court dismissed each indictment for lack of "venue-jurisdiction."[3]

Our first problem is to find out just what offense these men are charged with. The indictments each refer to title 50 U. S. C. App. sections 456 and 462. The Sokol indictment refers more particularly to section 456(j). The references to these two sections of the statute appear both at the head and in the body of the indictments. Section 456(j) has as its subject matter the treatment of those who by reason of religious training and belief are conscientiously opposed to participation in war. Provision is made for the manner in which this claim shall be presented. There appears in the section the authorization to the board to assign a registrant found to be conscientiously opposed even to noncombatant service to work of national importance. It states that one who "knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of [fol. 28] section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title."[4]

In section 462 (section 12 of the act) the conduct which is, among others, subject to sanction, is in any manner to "knowingly fail or neglect or refuse to perform any duty required of him under . . . this title . . . ."[5]

It will be noted that paragraph (j) above quoted carries the words "fails or neglects." Section 462 adds the word

---

[3] United States v. Johnston, 131 F. Supp. 955 (E. D. Pa. 1955).

[4] 65 Stat. 86 (1951), 50 U. S. C. App. § 456(j) (1952).

[5] 62 Stat. 622 (1948), 50 U. S. C. App. § 462(a) (1952).

"refuses." Did these registrants "refuse" to obey orders in the western district in such way as to make them responsible for violation of the statute under section 462? It is agreed that they there stated to their respective boards that they were not going to obey their assignment for service. We do not need to answer the question just stated because the defendants are not being prosecuted in the western district for their defiance of the board. They are indicted, instead, in the eastern district. It was in the eastern district where they failed to appear to do the work assigned to them. And it is this failure which constitutes the offense, if any, in the eastern district. Do the indictments charge this offense?

As to Sokol the answer is clear. He was indicted for neglecting "to perform a duty . . . in that he failed to report to the . . ." assigned hospital. Johnston, on the other hand, was charged with neglecting "to perform a duty . . . in that he failed and refused to obey an order . . . directing him to report . . ." at the place of assignment. As we construe this indictment, it charges Johnston with, among other things, failing to report to the specified hospital as ordered. That part of the indictment which charges him with possible offenses other than failing to report can be disregarded as surplusage.[6]

It is apparent that the failure to report to the place of assignment is an indictable offense under the act. Section [fol. 29] 462 makes it an offense to fail to perform a duty imposed by authority of the statute. Section 456(j) poses no obstacles. Indeed it raises the board's order to report to the level of a duty under section 462, at least to the extent that "failure" or "neglect" to obey the order is considered to be a violation of such a duty. On the other hand, we do not believe that the Sokol indictment is inadequate in that the board's order is not mentioned. The duty it created is. But where is the offense of failure to report consummated?

Now we have reached the interesting substantive question of criminal law. It is well established that one does not have to be physically present in a state to be guilty of

---

[6] Cf. Ford v. United States, 273 U.S. 593, 602 (1927).

a criminal offense there. The standard illustration, familiar to every law student, is that of shooting across a state boundary line and hitting a victim in the second state. The offense is complete where the fatal force hits the victim and the defendant may be prosecuted for homicide there if jurisdiction can be obtained over his person.[7] The same theory has been applied in both torts and crimes with regard to dissemination of defamatory words,[8] the loss sustained to one who relies upon false representations given to him by another from another state,[9] the injury resulting when canned food imported and distributed from one state causes harm in another,[10] and the attempt by letter mailed in one state to induce a public employee in another to violate his official duties.[11]

---

[7] State v. Hall, 114 N.C. 909, 19 S.E. 602 (1894); United States v. Davis, 25 Fed. Cas. 786, No. 14, 932 (1st Cir. 1837); see also Restatement Conflict of Laws, Note § 377, ill. 1 at 456 (1934) (same principle applicable in torts).

[8] *Torts:* Restatement, Conflict of Laws, Note § 377, ill. 7 at 457 (1934). *Crimes:* Sachs v. Government of the Canal Zone, 176 F.2d 292, 297 (5th Cir. 1949); State v. Piver, 74 Wash. 96, 132 P. 858 (1913).

[9] *Torts:* Restatement, Conflict of Laws, Note § 377, ill. 5, 6 at 457 (1934). *Crimes:* Updike v. People, 92 Col. 125, 18 P.2d 472 (1933); State v. Devot, 66 Utah 319, 242 P. 395 (1925); *but see* Commonwealth v. Schmunk, 22 Pa. Sup. 348 (1903), *affirmed*, 207 Pa. 544, 56 A. 1088 (1904). The conflict in the crimes cases stems from the fact that the substantive offense requires proof of the receipt, and not merely the loss, of property.

[10] *Torts:* Hunter v. Derby Foods, Inc., 110 F.2d 970 (2nd Cir. 1940).

[11] *Crimes:* In re Palliser, 136 U.S. 257 (1890). Referring to U. S. Const. art. III, § 2, cl. 3 and U. S. Const. amend. VI, the Court said that "the right thereby secured is not a right to be tried in the district where the accused resides, or even in the district in which he is personally at the time of committing the crime, but in the district 'wherein the crime shall have been committed.'" (*Id.* at 265).

[fol. 30] These defendants, however, did no act nor did they follow any course of conduct in the eastern district of Pennsylvania. What is being complained of is their failure to do, not what they did. This case raises the point left unanswered in *United States* v. *Anderson*, 328 U.S. 699, 706 (1946). But we think the answer is pretty clear on the basis of established legal rules applicable to other cases of omissions which have been made crimes. It is true, and no one disputes, that the Constitution (Sixth Amendment) requires that a person shall be tried in a district where the crime shall have been committed.[12] But it is also clear that where there is a legal duty to act and the failure to do that act is a criminal offense, the courts consider the criminal offense to take place where the defendant failed to perform that which the law required of him. This is illustrated by a variety of decisions in different fact situations. Here are some of the instances: the failure of an individual doing business in one county to surrender himself at a district court in another in response to a fiat in bankruptcy,[13] the neglect of a father residing in one county to support his children residing in another,[14] the failure of a witness to appear before a legislative committee in obedience to a summons,[15] the failure to file necessary reports with the appropriate governmental authorities in the District of Columbia concerning (1) the custody of enemy property and the indebtedness of alien enemies,[16] (2) an alien woman[17] and (3) rates and charges of a railroad,[18]

---

[12] *Ibid.*

[13] Regina v. Milner, 2 Car. & K. 309, 175 Eng. Rep. 128 (1846).

[14] State v. Peabody, 25 R.I. 544, 56 A. 1028 (1904); State v. Yocum, 182 Ind. 478, 106 N.E. 705 (1914).

[15] State v. Brewster, 87 N.J.L. 75, 93 A. 189 (1915).

[16] Rumely v. McCarthy, 250 U.S. 283 (1919).

[17] United States v. Lombardo, 241 U.S. 73 (1916).

[18] New York Cent. & H. R. R. Co. v. United States, 166 F. 267 (2nd Cir. 1908).

[fol. 31] and the failure to file tax returns with the Collector in the appropriate internal revenue district.[19]

We see no reason why this well established line of authority should not be applied in these selective service cases. We think what is being prosecuted here is the failure of these defendants to do what the law required them to do. Suppose these young men, after defying the local board in their respective communities, had within the period allotted for travel changed their minds and reported for their hospital duty at the places assigned on the given day. There certainly would be no offense of failure to report committed. Whether a crime or not, the prior refusal would not prevent compliance. Likewise in the case before us the prior refusal was neither the failure to report nor did it preclude the possibility of committing this offense. We think it clear that here this offense was committed at the time and place the act should have been performed. Such a viw has been expressed by federal courts applying the draft law.[20]

There is one further point which has to do with the Criminal Appeals Act, 18 U.S.C. § 3731 (1952). By that statute an appeal may be taken on behalf of the United States to the Supreme Court of the United States from a judgment of a district court dismissing an indictment where the judgment "is based upon the invalidity or construction of the statute upon which the indictment . . . is

---

[19] Bowles v. United States, 73 F.2d 772, 774 (4th Cir. 1934), *cert. denied*, 294 U.S. 710 (1935); United States v. Commerford, 64 F.2d 28, 32 (2nd Cir.), *cert. denied*, 289 U.S. 759 (1933).

[20] United States v. Van Den Berg, 139 F.2d 654, 656 (7th Cir. 1944); Humes v. Pescor, 148 F.2d 127, 128 (8th Cir. 1945); Jones v. Pescor, 169 F.2d 853, 855 (8th Cir. 1948); United States v. Sutter, 127 F. Supp. 109, 115 (S.D. Cal. 1954); *contra* United States v. Patterson, 132 F. Supp. 67 (D. Kan. 1955); United States v. Chiarito, 69 F. Supp. 317, 322 (D. Ore. 1946) (alternative holding). Penor v. United States, 167 F. 2d 553 (9th Cir. 1948) is not in point. There the crime charged was desertion of the original camp rather than failure to report to the one newly assigned.

founded." By the same section of the code an appeal may be taken by the United States to a court of appeals from a judgment of a district court setting aside or dismissing [fol. 32] any indictment "except where a direct appeal to the Supreme Court of the United States is provided . . ." Under the statute, then, we do not have authority to hear the appeal if it is one which is appealable directly to the Supreme Court.

In *United States* v. *Jones*, 345 U.S. 377 (1953), the Court sent back to a court of appeals a case where appeal had been taken directly to the Supreme Court and where, in the view of that Court, there was a question of examining and construing the information. This the Supreme Court said was not properly a question for it but for the court of appeals instead. We think that case governs this. As set out above, there is a question of construing the indictments in this case to see what is being charged. And the only statutory question is whether such charges can be brought under the act, a question primarily involving the adequacy of the indictment rather than the construction of the statute. The case is, therefore, a proper one for consideration at this level and this consideration we have endeavored to give it.

The judgment of the district court will be reversed and the case remanded.

[fol. 33] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,620

UNITED STATES OF AMERICA, APPELLANT,

vs.

PAUL DEEMER JOHNSTON

On Appeal from the United States District Court for the Eastern District of Pennsylvania

Present: Goodrich, Stanley and Hastie, Circuit Judges.

JUDGMENT—December 1, 1955

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, and the case remanded to the United States District Court for the Eastern District of Pennsylvania.

Attest:

December 1, 1955.

Ida O. Creskoff, Clerk.

[File endorsement omitted.]

[fols. 34-40] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,621

UNITED STATES OF AMERICA, Appellant,

vs.

JOHN SOKOL

On Appeal from the United States District Court for the Eastern District of Pennsylvania

Present: Goodrich, Staley and Hastie, Circuit Judges.

JUDGMENT—December 1, 1955

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, and the case remanded to the United States District Court for the Eastern District of Pennsylvania.

Attest:

Ida O. Creskoff, Clerk.

December 1, 1955.

[File endorsement omitted.]

[fol. 41] Petition for Rehearing Covering 17 Pages, Filed —Omitted from This Print. It Was Denied, and Nothing More by Order.

[fols. 42-52] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

ORDER SUR PETITION FOR REHEARING—January 4, 1956

Present: Goodrich, Staley and Hastie, Circuit Judges.

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By the Court, Herbert F. Goodrich.

Dated: January 4, 1956.

[File endorsement omitted.]

[fol. 53] Clerk's Certificate to foregoing trnscript omitted in printing.

[fol. 54] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 5, 1956.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

TRANSCRIPT

OF

RECORD

LIBRARY
SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 704

UNITED STATES OF AMERICA, PETITIONER,

vs.

DUDLEY A. PATTESON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 17, 1956

CERTIORARI GRANTED MARCH 5, 1956

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 704

UNITED STATES OF AMERICA, PETITIONER,

vs.

DUDLEY A. PATTESON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

INDEX

	Original	Print
Record from the United States District Court for the District of Kansas	1	1
Indictment	1	1
Order transferring case to U.S.D.C., Western Oklahoma	2	2
Order of U.S.D.C., Western Oklahoma, retransferring case to U.S.D.C., Kansas	3	3
Motion to dismiss indictment	3	3
Affidavit of Hayden C. Covington	4	4
Opinion of U.S.D.C., Eastern Pennsylvania, in case of United States v. Johnston	5	5
Memorandum opinion, Mellott, Chief Judge	6	6
Judgment	9	9
Notice of appeal	9	9
Concise statement of point relied upon	9	9
Clerk's certificate (omitted in printing)	10	
Proceedings in the United States Court of Appeals for the Tenth Circuit	11	10
Caption (omitted in printing)	11	
Argument and submission of case	12	10
Opinion, Pickett, J.	13	10
Judgment	20	13
Clerk's certificate (omitted in printing)	21	
Order allowing certiorari	22	14

1 In the District Court of the United States for the District of Kansas

UNITED STATES OF AMERICA, PLAINTIFF,

vs.

DUDLEY A. PATTERSON, DEFENDANT.

No. 9391, Criminal.

INDICTMENT.—Filed October 7, 1954

The Grand Jury charges:

On or about July 26, 1954, in the District of Kansas and within the jurisdiction of this court, Dudley A. Patterson being a male citizen of the United States and required to register under the Universal Military Training and Service Act, and the amendments thereto, the Proclamation of the President of the United States and the rules, regulations and directions given thereunder, prescribe and executed *pursuant* to such Act as aforesaid, he having registered with Local Board No. 57 for *Oklahoma* County, Oklahoma, and having been classified by said Board I-O, and the said Board having issued an order, duly mailed to him, for the said Dudley A. Patterson ordering him to report on July 26, 1954, for civilian work contributing to the maintenance of the national health, safety and interest as the said Board deemed appropriate, and he, the said Dudley A. Patterson, did knowingly and willfully refuse, neglect and fail to report at the Topeka State Hospital at the time and place so designated in said order,

A True Bill.

W. LAIRD DEAN,
Foreman.

SELBY S. SOWARD,
Assistant United States Attorney.

4 Bond fixed at $1500.00.
DELMAS C. HILL,
Judge.

2 In United States District Court for the District of Kansas

[Title omitted]

ORDER TRANSFERRING CASE TO U.S.D.C., WESTERN OKLAHOMA—Filed March 22, 1955

Now on this 21st day of March, 1955, this matter comes regularly on for hearing before the Honorable Arthur J. Mellott, Chief Judge of the United States District Court for the District of Kansas. The defendant is present in person and the United States is represented by Selby S. Soward, Assistant United States Attorney for the District of Kansas.

Thereupon and before arraignment or other proceedings are had in this matter it is shown to the court that the defendant herein is a resident of Oklahoma City, Oklahoma and is registered with the Local Draft Board for Oklahoma County.

The court thereupon sua sponte orders this case transferred to the Western District of Oklahoma for trial under the provisions of Rule 21(b) of the Federal Rules of Criminal Procedure.

It is therefore by the Court ordered that this case be transferred to the Western District of Oklahoma for trial.

It is further ordered that the pleadings in this matter on file in the office of the Clerk of the District Court for the District of Kansas or certified copies thereof be transferred to the Clerk of the United States District Court for the Western District of Oklahoma at Oklahoma City.

It is further ordered that the defendant Dudley A. Patterson be released so far as his present bond is concerned and that his bond for his appearance in this court be cancelled, set aside and held for naught, and that the defendant report to the Clerk of the United States District Court for the Western District of Oklahoma on March 28, 1955, at Oklahoma City, Oklahoma, there to give a new bond for his appearance before that court in accordance with the rules and practice required by said court.

ARTHUR J. MELLOTT,
Judge.

Approved as to Form, Selby S. Soward, Assistant U.S. Attorney, Attorney for Plaintiff.

3 In United States District Court for the Western District of Oklahoma

[Title omitted]

ORDER RE-TRANSFERRING CASE TO U.S.D.C., KANSAS—Filed April 27, 1955

This matter having come up on the 25th day of April, 1955, upon the application of Assistant United States Attorney, George Camp, for an order re-transferring this matter to the United States District Court for the District of Kansas and the Court having fully satisfied itself that the jurisdiction for this alleged offense lies solely in Kansas, and that the defendant cannot effectively waive the jurisdiction,

IT IS THEREFORE ORDERED by the Court that this matter be re-transferred to the United States District Court for the District of Kansas for further proceedings and that the Clerk for the Western District of Oklahoma is hereby directed to transfer his file from his office to the office of the Clerk of the United States District Court for the District of Kansas.

W. R. WALLACE,
United States District Judge.

In United States District Court for the District of Kansas

MOTION TO DISMISS INDICTMENT—Filed May 13, 1955.

May it please The COURT:

Now comes the defendant and moves the Court for an order to dismiss the indictment against the defendant for the reasons that the Court does not have venue and jurisdiction of the offense.

The defendant was indicted for knowingly failing to perform a duty imposed upon him under the Universal Military Training and Service Act. The defendant resides in Oklahoma City, which is within the jurisdiction of the United States District Court for the Western District of Oklahoma. He registered under the act with his local board in Oklahoma City. Throughout his entire processing he dealt only with the selective service officials in the State of Oklahoma. He was finally ordered by the Oklahoma City board to perform work at the Topeka State Hospital at Topeka, Kansas. He reported at his local in Oklahoma City and personally notified the board that he would refuse to accept such employment at the Topeka State Hospital. He never at any time reported at the Topeka State Hospital. He never left the State of Oklahoma or the Western District of Oklahoma to report for

the assigned work. The failure to perform the duty that constitutes the offense occurred in the State of Oklahoma. The refusal to report to the hospital was an act that was committed in the Western District of Oklahoma and not in the District of Kansas.

WHEREFORE the defendant prays that upon a consideration of this motion, the indictment be dismissed for lack of jurisdiction of this Court to prosecute the defendant.

DUDLEY A. PATTERSON,
By: HAYDEN C. COVINGTON,
Counsel for Defendant.

Filed with affidavit May 13, 1955.

AFFIDAVIT SUPPORTING MOTION TO DISMISS INDICTMENT

State of New York,
County of Kings, ss:

Hayden C. Covington, being duly sworn, deposes and says:

I am a member of the bars of the States of Texas and New York, of the Supreme Court of the United States and of all of the United States Courts of Appeals. I maintain my office at 124 Columbia Heights, Brooklyn 1, New York. I have been engaged to represent the defendant in this case.

The indictment in this case was originally returned in this district and the case was transferred properly by the Court to the Western District of Oklahoma. Recently the case was returned by order of the district court at Oklahoma City to this Court. The case has been placed upon the calendar for trial at the session of this Court beginning May 23, 1955, at Kansas City, Kansas.

All of the witnesses that will have to give testimony in this case reside in Oklahoma City. The defendant will be put unjustly to the expense and trouble of getting witnesses brought from Oklahoma City. He may not be able to get his witnesses and evidence ready in time for trial because of the distance and the fact that the witnesses all reside beyond the jurisdiction of this Court. It works a hardship on him to try the case in this Court because he will *pay* to pay travel fees and other expenses for the attendance of witnesses which will be prohibitive and make it impossible to prove his defenses.

The Court does not have jurisdiction of this offense. I have dictated the above and foregoing motion to dismiss the indictment. I have examined the record and the draft board file and I am familiar with all the facts. I state that the facts appearing above and in the motion to dismiss the indictment are true and correct.

I rely upon United States v. Johnston, Cr. No. 17804, decided by the United States District Court for the Eastern District of Pennsylvania, on March 17, 1955. I submit to the Court, accompanying this affidavit, the opinion of Judge Ganey in the Johnston case.

The defendant does not desire to have oral argument on the motion to dismiss the indictment. The Court is respectfully requested to receive the motion and determine it, based upon the motion, this affidavit and whatever papers and oral argument the United States Attorney desires to submit and make to the Court.

HAYDEN C. COVINGTON

Subscribed and sworn to before me this 10th day of May 1955.

WILLIAM K. JACKSON

United States District Court, Eastern District of Pennsylvania, Criminal No. 17,804, United States of America v. Paul Deemer Johnston. Criminal No. 17,879, United States of America v. John Sokol.

OPINION.

March 17, 1955.

GANEY, J.

Each of the defendants' motion to dismiss the indictment against him raises the troublesome question of venue-jurisdiction. Defendants were indicted for knowingly neglecting to perform a duty imposed upon them pursuant to the provisions of the Universal Military Training and Service Act of 1948, 62 Stat. 604, as amended, 50 U.S.C.A. Appendix, Sec. 451 et seq.

The defendant, Paul Deemer Johnston, resided in the Western District of Pennsylvania. He registered under the Act with his local draft board in that district, and *throughout* his selective proceedings he dealt only with selective service personnel there. He was finally given a I-O classification as a conscientious objector, which entitled him to perform two years of civilian work contributing to the national health in lieu of his being inducted into the armed forces. Subsequently the local board, in accordance with Selective Service regulations, notified him by mail in the western judicial district of Pennsylvania to report to it for the assignment of civilian work. He was instructed to report to the Norristown State Hospital located in the Eastern District of Pennsylvania, the judicial district of this court, on November 30, 1953.

6 At the time of the assignment, he personally notified the board of his refusal to accept such employment. He has not entered this district to report for the assigned work.

The story of the other defendant, John Sokol, is parallel to that of defendant Johnston.

On the assumption that when the omission to perform a duty constitutes a crime the venue is in the judicial district in which the duty should have been performed, the Government indicted the defendants in this district.[1]

Our problem, as in United States v. Anderson, 328 U.S. 699, 705 (1946), is to ascertain what duty it was, the failure to perform, that constituted the crime, and what acts of the defendants constituted the violation in order to determine where the crime was committed.

Clearly the duty in each case was to report to the State Hospital, the place of performance, in this judicial district. However we think the violation was the defendants' refusal to report to the place of performance. The refusal in both cases took place in the Western District of Pennsylvania, and not in this district where defendants were never physically present.[2] Penor v. United States, 9th Cir., 1948, 167 F. 2d 553, 555; United States v. Chiarito, D. C. Ore., 1946, 69 F. Supp. 317, 322-325.

Accordingly, the defendant's motion in each case to dismiss the indictment will be allowed for lack of jurisdiction.

In United States District Court for the District of Kansas

MEMORANDUM OPINION.—May 16, 1955

Mellott, Chief Judge: The issue before the court arises upon a motion to dismiss. The indictment charges that the defendant, having registered with Local Board No. 57 for Oklahoma County, Oklahoma, having been classified by that board I-O, and the board having issued an order for him to report on July 25, 1954 for civilian work contributing to the maintenance of national health, safety and interest, "did knowingly and willfully refuse, neglect and fail to report at the Topeka [Kansas] State Hospital at the time and place so designated in said order."

When the case came on for trial, after it had been shown to the court that the defendant was at all times in the State of Okla-

---

[1] Cf. Footnote 14 on page 705 of United States v. Anderson, 328 U.S. 699 (1946).

[2] See footnote 11 on page 704 of United States v. Anderson, 328 U.S. 699, in which the Court pointed out that "the Department of Justice in 1942 had instructed United States Attorneys that, in cases of failure to report for induction, 'venue is in the district where the subject was ordered to report,' apparently without regard to whether he had been present physically there." (Italics supplied.)

homa, that the files were with the local board in that district, that it was the state and district of the residence of the defendant, and that the refusal to report at the time and place charged in the indictment had taken place in the Western District of Oklahoma, the court concluded that the venue lay in that district and sua sponte ordered the case transferred there for trial under the provisions of Rule 21 (b)[3] of the Federal Rules of Criminal Procedure.

After the file was transmitted to the United States District Court for the Western District of Oklahoma, one of the judges of that court signed an order re-transferring the case to this court for further proceedings and directing the clerk of that court "to transfer his file from his office to the office of the Clerk of the United States District Court for the District of Kansas."

In the motion to dismiss, subsequently filed in this court, it is alleged:

"The defendant was indicted for knowingly failing to perform a duty imposed upon him under the Universal Military Training and Service Act. The defendant resides in Oklahoma City, which is within the jurisdiction of the United States District Court for the Western District of Oklahoma. He registered under the act with his local board in Oklahoma City. Throughout his entire processing he dealt only with the selective service officials in the State of Oklahoma. He was finally ordered by the Okla-

8 homa City board to perform work at the Topeka State Hospital at Topeka, Kansas. He reported at his local board in Oklahoma City and personally notified the board that he would refuse to accept such employment at the Topeka State Hospital. He never at any time reported at the Topeka State Hospital. He never left the State of Oklahoma or the Western District of Oklahoma to report for the assigned work. The failure to perform the duty that constitutes the offense occurred in the State of Oklahoma. The refusal to report to the hospital was an act that was committed in the Western District of Oklahoma and not in the District of Kansas."

---

[3] "Rule 21. Transfer from the District Division for Trial

* * *

"(b) Offense Committed in Two or More Districts or Divisions. The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged."

Apparently, counsel for the United States does not controvert any of the basic facts. In a memorandum opposing the motion to dismiss it is stated:

"It is the position of the United States that jurisdiction of the offense alleged in this Indictment is in the District of Kansas. It is in this district that the work required would have been performed. Therefore the omission which constitutes the criminal act necessarily occurs in this district."

One of the cases cited in the memorandum supports the contention made. In United States v. Sutter (D.C. S.D. Calif.) 127 F. Supp. 109, 115, two registrants in the Northern District of California had been ordered to report to the Los Angeles County of Charities within the Southern District of California. It was held, apparently largely on the basis of language used in Jones v. Pescor (8 Cir.), 169 F. 2d 853, that venue lay in, and jurisdiction existed with, the District Court for the Southern District of California. Judge Ganey of the Eastern District of Pennsylvania, however, under facts essentially parallel—registrants in Western District ordered by board in that district to report to Norristown State Hospital located in the Eastern District—held that the indictments should be dismissed for lack of jurisdiction. United States v. Johnston, No. 17804, and Sokol, No. 17879, — F. Supp. —.

The latter view, this court believes, is the sounder. United States v. Anderson, 328 U.S. 699, 66 S. Ct. 1213, 90 L. Ed. 1529, cited in both opinions and in the memorandum filed by the United States here, did not decide the present question. It is still "necessary in order to decide where the crime is committed to ascertain what duty it was, the failure to perform which constitutes the crime, * * *." The duty of this defendant was to follow the order of the Oklahoma Board, given to him in Oklahoma, to report on July 25, 1954 for civilian work contributing to the maintenance of national health, safety and interest. His failure to do so constitutes the crime charged in the indictment.

Order is being entered sustaining the motion to dismiss the indictment.

9 Entered May 16, 1955

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

JUDGMENT—May 16, 1955

For the reasons set out in the memorandum opinion this date entered herein, it is now by the court

ORDERED that the motion to dismiss the indictment be, and it hereby is, sustained.

Dated at Kansas City, this 16th day of May, 1955.

ARTHUR J. MELLOTT,
Chief Judge.

Entered May 16, 1955.

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

NOTICE OF APPEAL—Filed June 10, 1955

The plaintiff herein, United States of America, by Shelby S. Soward, Assistant United States Attorney for the District of Kansas, gives notice hereby that it appeals from the Order of this Court dated and entered May 16, 1955, directing that the Defendant's Motion to Dismiss the Indictment herein be sustained.

Dated this 10th day of June, 1955.

SELBY S. SOWARD,
Assistant United States Attorney,
Attorney for Plaintiff.

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

CONCISE STATEMENT OF POINT RELIED UPON—Filed June 30, 1955

The plaintiff herein contends the District Court erred in finding jurisdiction in this case did not lie in the district of Kansas and sustaining the defendant's Motion to Dismiss the Indictment.

SELBY S. SOWARD,
Assistant U. S. Attorney,
District of Kansas.

Filed with proof of service June 30, 1955.

10 Clerk's Certificate to foregoing transcript omitted in printing.

11 In United States Court of Appeals for the Tenth Circuit

[Caption omitted]

12 In United States Court of Appeals

ARGUMENT AND SUBMISSION—November 16, 1955

This cause came on to be heard and was argued by counsel, Selby S. Soward, Esquire, appearing for appellant, Hayden C. Covington, Esquire, appearing for appellee.

Thereupon this cause was submitted to the court.

13 United States Court of Appeals, Tenth Circuit

No. 5193—November Term, 1955

UNITED STATES OF AMERICA, APPELLANT,

v.

DUDLEY A. PATTESON, APPELLEE

Appeal from the United States District Court for the District of Kansas

OPINION—January 19, 1956

Selby S. Soward (William C. Farmer, U. S. Attorney, was with him on the brief), for Appellant;

Hayden C. Covington, for Appellee.

Before MURRAH, and PICKETT, Circuit Judges, and RICE, District Judge.

PICKETT, Circuit Judge:

14 The question presented by this appeal is one of jurisdiction in a prosecution for violation of the provisions of the Universal Military Training and Service Act. (50 U.S.C.A. App. Sec. 451 et seq.) The defendant Patteson, a resident of Oklahoma City, Oklahoma, registered with the local Selective Service Board and was classified 1-O. This classification is one designated for those who are conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces of the United States. 50 U.S.C.A. App. Sec. 456(j). In lieu of induction, the local board ordered Patteson to report to it on July 26, 1954, to receive instructions for civilian work contributing to the maintenance of the national health, safety or interest at the Topeka State Hospital in Topeka, Kansas. In compliance with the order, he reported to the local board and there

notified the board that he would not proceed to Topeka for the performance of the required civilian work. He never left the State of Oklahoma.

On October 7, 1954, the defendant was indicted in the United States District Court for the District of Kansas for violation of 50 U.S.C.A. Sec. 462. The indictment charged that the defendant did knowingly and willfully refuse, neglect and fail to report to the Topeka Hospital as ordered by the local board. The District Court dismissed the indictment on the ground that the offense was not committed in Kansas. 132 F. Supp. 67. The United States has appealed.

Section 12 of the Act (59 U.S.C.A. Sec. 463(a)) provides
15 that any person "charged as herein provided with the duty of carrying out any of the provisions of this title, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment." The Sixth Amendment to the Constitution of the United States requires that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial "by an impartial jury of the State and district wherein the crime shall have been committed, * * *." The question narrows itself to that of where was the crime committed. The United States argues that the order of the local board required Patteson to report at the Topeka Hospital; that his omission or failure to report there was the act which constituted the violation; and that the crime was committed in Kansas by this omission or failure. It relies upon decisions which uphold jurisdiction of prosecutions in the districts where a statute requires an act to be done.[4] Generally, these cases hold that when an omission or failure to act constitutes a crime, the jurisdiction of a prosecution for a violation is in the district where the act should have been performed, even though
16 the person charged was not physically present in that district at the time of the omission or failure. The third Circuit in United States v. Johnson, —— F.2d ——, adopted this analogy and held in a case similar to the one before this court that jurisdiction was at the place where the conscientious objector was ordered to report. We do not think that the offense was an

[4] See Rumely v. McCarthy, 250 U.S. 283; United States v. Lombardo, 241 U.S. 73; United States v. Commerford, 2 Cir., 64 F.2d 28, cert. den. 289 U.S. 759; N. Y. Central and H.R.R. Co. v. United States, 2 Cir., 166 F. 267; State v. Peabody, 25 R.I. 54, 56 Atl. 1028.

act of omission or an offense of misfeasance or malfeasance which would pass from one jurisdiction to another, but a refusal to take a positive step in the process of induction or assignment to civilian work and that this refusal was in Oklahoma.

As is pointed out in United States v. Anderson, 328 U.S. 699, "The constitutional specification is geographic; and the geography prescribed in the district or districts within which the offense is committed. This may or may not be the place where the defendant resides; where the draft board is located; or where the duty violated would be performed, if performed in full. The places of residence, of the draft board's location, of final and complete performance, all may be situated in districts different from that where the criminal act is done. When they so differ, it is the latter, not any of the former, which determines the jurisdiction." (Footnotes omitted).

So far as compliance with the requirements of the Act or the regulations is concerned, the conscientious objector is in no different position than any other person subject to its provisions.
17 Induction into the service is the end product of submission to the Selective Service process and compliance with the orders of the local board. Billings v. Truesdale, 321 U.S. 542. Induction is brought about by a continuous process of steps beginning with registration, and it ends when the registrant is accepted into the military service or enters into civilian work. A wilful refusal of those affected by the Act to take any one of the necessary steps constitutes a violation. Gibson v. United States, 329 U.S. 338; Billings v. Truesdale, supra; Falbo v. United States, 320 U.S. 549; Hudson v. United States, 10 Cir., 157 F.2d 782, cert. den. 329 U.S. 813; Shigeru Fujii v. United States, 10 Cir., 148 F.2d 298, cert. den. 325 U.S. 868; Berman v. United States, 9 Cir., 156 F.2d 377, cert. den. 329 U.S. 795.

Patteson had taken all the required steps in the process of induction up to compliance with the local board's order which required him to report to it for assignment to Topeka, Kansas for civilian work in lieu of induction into the armed forces. The duty required of him by the order was to proceed to Topeka. This was no more than a necessary intermediate step in the continuous process, the ultimate purpose of which was to get Patteson into civilian work. Falbo v. United States, supra. It seems to us quite clear that his refusal to take this step occurred when he notified his local board in Oklahoma that he would go no further. Had he proceeded to Topeka and then refused to do the assigned work, a separate offense would have been committed. Gibson v.
18 United States, supra; United States v. Anderson, supra. In Dodez v. United States, 329 U.S. 338, and Jeffries v. United States, 10 Cir., 169 F.2d 86, prosecutions were had in the district where the board was located when the registrants refused to report

for work of national importance after being ordered to do so, and the jurisdiction of the courts was not questioned.[5]

Jurisdiction as contended for by the United States might require a conscientious objector who refused to obey the local board's order to go to a distant state or territory of the United States, or even outside the continental limits of the United States, where he had never been, to defend a prosecution for an act, that is a refusal to proceed, which occurred in his home district. This, of course, would not determine jurisdiction if the crime was actually committed elsewhere, but as was said in United States v. Johnson, 323 U.S. 273, "Questions of venue in criminal cases, therefore, are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must
19 be construed. If an enactment of Congress equally permits the underlying spirit of the Constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even though not commanded by it."

Affirmed.

20 In United States Court of Appeals

JUDGMENT—January 19, 1956

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Kansas and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

21 Clerk's Certificate to foregoing transcript omitted in printing.

---

[5] In the Jeffries Case, the court said:

"Clearly, the duty of Jeffries to report embraced more than putting in an appearance at the time and place designated in the order. It included a willingness to be assigned to work of national importance under civilian direction and to go to the camp to which he had been assigned.

"The appearance of Jeffries at the office of the Local Board at the time indicated in the order with the intent and purpose not to accept assignment to work of national importance and not to go to the camp to which he had been assigned was as much a non-compliance with the order as if he had not appeared at the office of the Local Board."